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MCLE SELF-STUDY

How To Administer Family and Medical Leave Requests

*By Calvin House**

Requests for family or medical leave raise issues under several statutes—the federal Family and Medical Leave Act, the California Family Rights Act, the federal Americans with Disabilities Act, the disability and pregnancy leave provisions of the Fair Employment and Housing Act, and the Workers Compensation Act. This primer on family and medical leave will summarize the essential provisions of each statute, and explain how to apply those provisions at the workplace.

THE STATUTES

Family and Medical Leave Act/ California Family Rights Act[1]

These two statutes are substantially similar, but there are important differences.

The Similarities

Both statutes require all public employers to provide unpaid leave to allow bonding between parents and their newly arrived children,[2] and to allow employees to have time to attend to their own serious health conditions or to those of their family members, without having to worry about job security. Employees are eligible for up to 12 weeks of leave under the statutes if they have been on the payroll for 12 months, and have actually worked for 1250 hours in the preceding 12 months.

The employer must continue providing group health benefits during the leave period. If the employee pays a portion of the premium and the family leave is unpaid (making payroll deduction impossible), the employer should arrange for payment before the leave commences. If the employee does not return from the family leave for at least 30 days, the employer may recover its health coverage costs, unless the failure to return is beyond the employee's control, or results from the continuation, recurrence or onset of a serious health condition.

If the leave is for a serious health condition, the employer may require medical certification that the condition meets the statutory definition. If it is for the employee's own health, the condition must render the employee unable to perform the essential functions of his or her job. In that case, the employer may pay for a second opinion if it has reason to doubt the validity of that received from the employee's doctor. If the two opinions differ, the employer may pay for a third binding opinion. Because of the strict medical privacy laws in California, employers should be careful not to ask for any information beyond confirmation of the serious health condition. The Fair Employment and Housing Commission has provided a suggested certification form in its regulations.[3]

The employee may take the leave in small pieces if it is for the employee's own serious health condition or for that of a family member, a few days at a time or an hour here or there. The employer may require that leave for baby-bonding purposes be taken in larger

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Public Law Section Roster

pieces, but the two statutes differ on how much discretion the employer has. All baby bonding leave with respect to a particular child must be taken within a year of the child's arrival.

The employer has a choice of four methods for determining when an employee has used up the 12-week entitlement:

- The current calendar year;
- Any fixed 12-month period (such as a fiscal year);
- The 12-month period following the date on which the first family leave begins, or
- The 12-month period before the date that an employee uses any family leave.

The employer must use the same calculation method for all employees. If the employer does not give adequate notice of the method used to calculate the 12-month period, the law presumes the method that is most beneficial to the employee.

Once the condition is no longer present or the leave entitlement is used up, the employee has a right to return to the same or a comparable job, unless he or she is a "key" employee. A "key" employee is one who is salaried, among the highest paid 10 percent of employees within 75 miles, and denying a return to work is necessary to prevent substantial and grievous economic injury to the operations of the employer.[4]

The Differences

The CFRA *excludes* pregnancy related conditions from its definition of serious health condition, while the FMLA *includes* such conditions in its definition. The reason for the difference is that California has a separate pregnancy disability leave provision, which is discussed in the next section. The effect of the difference is that a woman on leave because of pregnancy is using up FMLA time, but not CFRA time. This article explains below how that affects the total amount of leave that a pregnant woman may be entitled to.

Both the FMLA and the CFRA restrict the family leave entitlement to children, spouses and parents. By operation of the California Domestic Partner Rights and Responsibilities Act of 2003, the CFRA has included registered domestic partners since January 1, 2005.[5] That act defines domestic partners as follows:

> (a) Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.
>
> (b) A domestic partnership shall be established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division, and, at the time of filing, all of the following requirements are met:
>
> (1) Both persons have a common residence.
>
> (2) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
>
> (3) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
>
> (4) Both persons are at least 18 years of age.
>
> (5) Either of the following:
>
> (A) Both persons are members of the same sex.
>
> (B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.
>
> (6) Both persons are capable of consenting to the domestic partnership.[6]

The effect of the difference is that an employee who takes leave to participate in the care of a registered domestic partner is using up CFRA time, but not FMLA time. Public employers must make sure that their payroll systems are tracking the two leave entitlements separately.

The FMLA allows employers to force their employees to take all baby bonding leave at one time. The CFRA allows employers to restrict the use of incremental leave for baby bonding, but only as follows:

> The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions.[7]

Under the FMLA, if both *husband* and *wife* work for the same employer and are eligible for baby bonding leave, the employer may limit them to a combined total of 12 weeks of leave for that purpose.[8] Under the CFRA, if both *parents* (whether or not they are husband and wife) work for the same employer and are eligible for baby bonding leave, the employer may limit them to a combined total of 12 weeks of leave.[9] If the parents are not married, they are both entitled to a full 12 weeks under the FMLA.

Pregnancy Disability Leave

The Fair Employment and Housing Act provides a pregnant employee who is disabled by pregnancy with up to four months of leave. The leave may be taken on an intermittent or reduced schedule basis. A woman is disabled by pregnancy if "she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons," or "if she is suffering from severe 'morning sickness' or needs to take time off for prenatal care."[10] The employer may require medical certification of the disability.

Although the pregnancy disability leave provision does not by itself require the employer to keep the employee's group health benefits in place, a woman who qualifies for the leave also has a serious health condition, as

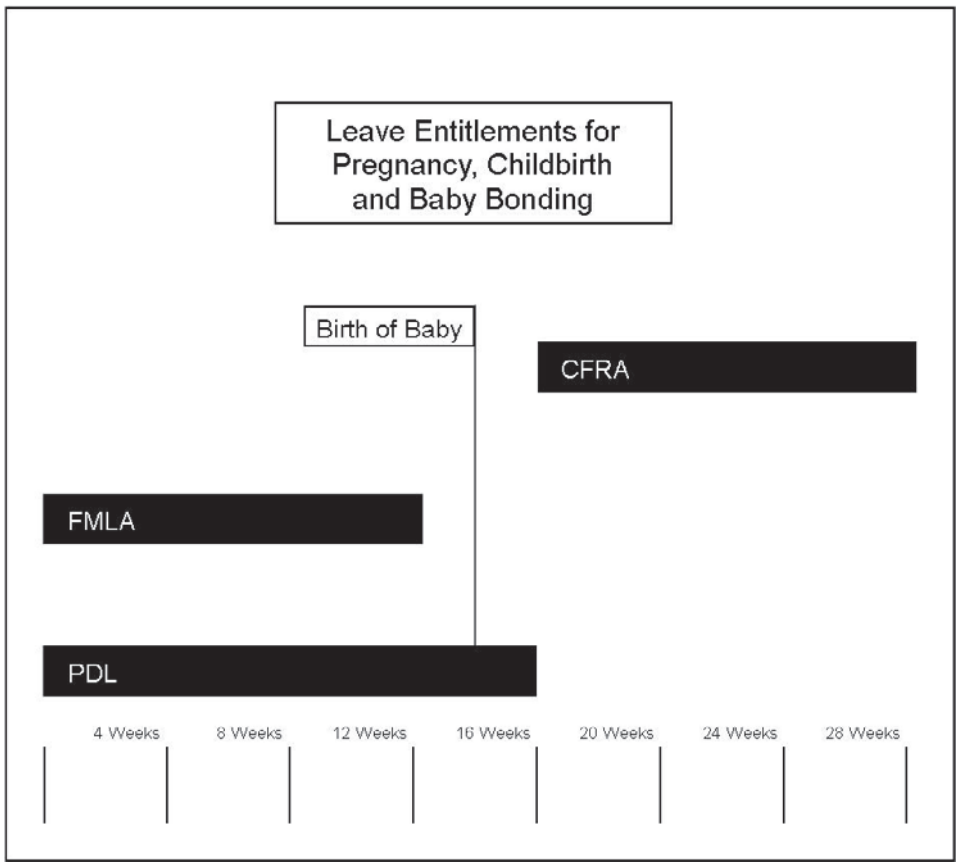
defined in the FMLA. Therefore, the employer must maintain group health benefits during the 12-week entitlement to FMLA leave. If the woman qualifies for pregnancy disability leave for the entire four-month allotment under the FEHA, she will lose her entitlement to continuation of benefits after 12 weeks.

There is no service requirement. A woman is entitled to pregnancy disability leave from her first day on the job. An employer may not deny employment to a pregnant woman unless justified as a bona fide occupational qualification, which requires proof that "all or substantially all of the excluded individuals [that is, pregnant women] are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined."[11]

In some situations, the pregnant employee may be able to continue working, but require a transfer to another position. The employer must grant such a request if the woman's health care provider certifies that it is medically advisable; and the transfer can be reasonably accommodated.

At the conclusion of pregnancy disability leave, the employer must return the employee to the same position that she held when the leave began, unless she would not have been in that position for legitimate business reasons unrelated to the pregnancy leave, such as a layoff for financial reasons; or keeping the job duties for the employee would substantially undermine the employer's ability to operate the business safely and efficiently. In that event, the employer must consider reinstating her to a comparable position that is virtually identical to the position from which leave was taken, unless there is no comparable position available, or reinstating the employee to an available comparable position would substantially undermine the employer's ability to operate the business safely and efficiently.

Together, the CFRA and the pregnancy disability leave provisions entitle a pregnant woman to up to seven months of leave—the four months for pregnancy disability leave, followed by 12 weeks of baby bonding time under the CFRA. That is because the CFRA does not include pregnancy-related conditions within its definition of serious health condition.[12]



Americans with Disabilities Act/Fair Employment and Housing Act

When responding to a leave request, public employers must also consider the requirements of the Americans with Disabilities Act and the disability discrimination provisions of the FEHA. Those statutes require employers to refrain from discriminatory action against disabled employees who can perform the essential functions of their jobs with or without reasonable accommodations. They also impose an affirmative obligation to provide reasonable accommodations to such employees.

The courts interpret those laws to require granting unpaid leave with a promise of reinstatement as a reasonable accommodation, where needed to permit for such things as medical treatment related to the disability, recuperating from an illness or episodic manifestation of the disability, temporary adverse conditions at work, or training in the use of an assistive device.

Most courts have concluded that regular attendance is an essential function of the job, and that employers need not tolerate repeated, unplanned absenteeism.[13] Although an employer need not wait indefinitely for an employee to recover, or to undergo treatment,[14] there is no specific guidance on how much leave the employer must grant. The employee is entitled to a reasonable amount of leave that does not constitute an undue burden. In one case, a court ruled determined that an employer should have allowed an employee with posttraumatic stress disorder a five-month leave to undergo treatment as a reasonable accommodation.[15] The federal Equal Employment Opportunity Commission has opined that employers must extend leave and hold the disabled employee's position open indefinitely unless doing so would be an undue hardship. If doing so is an undue hardship, then the employer must determine whether there is a vacant position that can be held open indefinitely.[16]

As a result, an employee who has a disability may be entitled to leave beyond the 12 weeks authorized by the FMLA and the CFRA. Further, the definition of disability under the FEHA is very expansive. It includes

any physical or mental condition that "limits" a major life activity, without regard to whether there are mitigating measures that reduce the effects of the condition.[17]

Workers' Compensation Act

The Workers' Compensation Act regulates employer leave policies through its prohibition on discrimination against workers who suffer an industrial injury.[18] In the typical scenario, an employee suffers an injury at work that requires time off from work for treatment and recovery. The employer would violate the anti-discrimination provision if it automatically terminated its employment relationship with such an employee because of absence from work. On the other hand, the California Supreme Court has explained that the prohibition "does not compel an employer to ignore the realities of doing business by re-employing unqualified employees or employees for whom positions are no longer available."[19]

The Act does not specify an amount of time that employers must allow their employees to remain off work. The test is whether the realities of doing business require the employer to replace the employee before he or she can return to work. This is a different standard than the one applied under the disability discrimination laws (whether keeping the job open would impose an undue hardship) and the FMLA/CFRA (which *require* that a job be held open for an employee out on qualified family leave).

RESPONDING TO LEAVE REQUESTS

The potential for application of six different statutes to a request for leave related to a medical condition can create confusion and uncertainty. Here are some steps that public agencies should take to assure that they are complying with all the requirements.

1. Job Descriptions

The entitlement to leave will often depend on the impact of the medical condition in question on the employee's ability to perform his or her job duties. Written job descriptions are essential to a proper assessment of that impact. Many job classifications developed for public employers are not sufficient for this purpose. They tend to contain lengthy lists of possible duties, and do not focus on the essential functions and physical tasks associated with the job. Since many decisions about entitlement to leave depend upon proper assessment of the employee's ability to perform essential functions and physical tasks, the lack of such information may hamper decision-making.

2. Regular Evaluations

The law protects an employee who requests or takes leave from retaliation. An employee who brings a retaliation claim has a minimal burden to meet to establish a prima facie case.[20] That places the burden on the employer to prove a legitimate reason for its decision. That reason will often be poor performance. To prove in court that poor performance was the real reason (and not a pretext for retaliation), the employer must be able to provide a paper trail of poor performance. Without written documentation of pre-existing performance problems, no judge or jury will believe that poor performance explains a discharge that closely follows a protected leave.

3. Develop Comprehensive Forms

It is also important to make a proper written record of the leave request and the response to it. By developing a comprehensive form that covers all the types of leave discussed in this article, the employer will ensure compliance with applicable legal principles and foster sound decisions on leave requests. The form should provide a systematic questionnaire that solicits all information necessary to respond to a leave request. A good example of such a form is the WH-381 "Employer Response to Employee Request for Family or Medical Leave," developed by the United States Department of Labor for FMLA requests. It is available for download at http://www.dol.gov/esa/forms/whd/WH-381.pdf. Since that form only covers FMLA issues, employers should use it as a starting point, and supplement it with the other leave issues discussed here.

4. Enlist Professional Medical Opinion

When responding to a leave request requires an assessment of the employee's medical condition, employers should do two things to reduce the risk of liability—(1) keep personal medical information out of the workplace, and (2) enlist a professional medical opinion. Collecting medical information in the workplace risks invasion of privacy lawsuits and the possibility of employment decisions based on misconceptions and misjudgments.

By referring any assessment out to a medical professional, the employer can assure that medical information stays in the physician's office. Restrict the physician's opinion to the ultimate issue. For example, ask the physician to state whether the patient has a serious health condition as defined in the FMLA/CFRA. Do not ask for a diagnosis or medical history. Use the sample medical certification form included in the CFRA regulations.[21] Develop a similar form for other types of leave.

ENDNOTES

1. The Family and Medical Leave Act appears at 29 U.S.C. §§ 2601; the California Family Rights Act at Cal. Gov't Code §§ 12945.2 and 19702.3.
2. A child is a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." 29 U.S.C. § 2611(12). The CFRA regulations contain a similar definition. *See* Cal. Code Regs., tit. 2, § 7297.0(c).
3. Cal. Code Regs., tit. 2, § 7297.11.
4. 29 U.S.C. § 2614(b); Cal. Gov't Code § 12945.2(r).
5. "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court

rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Cal. Fam. Code § 297.5.

6. Cal. Fam. Code § 297.
7. Cal. Code Regs., tit. 2, § 7297.3(d).
8. 29 U.S.C. § 2612(f).
9. Cal. Code Regs., tit. 2, § 7297.1(c).
10. Cal. Code Regs., tit. 2, § 7291.2(g).
11. Cal. Code Regs., tit. 2, § 7286.7(a).
12. Cal. Code Regs., tit. 2, § 7291.13.
13. *Tyndall v. National Educ. Ctrs. Inc.,* 31 F.3d 209 (4th Cir. 1994); *Carr v. Reno,* 23 F.3d 525 (D.C. Cir. 1994); *Jackson v. Veterans Admin.,* 22 F.3d 277 (11th Cir. 1994); *Barfield v. Bell South Telecommunications, Inc.,* 886 F. Supp. 1321 (S.D. Miss. 1995); *Matzo v. Postmaster General,* 685 F. Supp. 260 (D.D.C. 1987), *aff'd*, 861 F.2d 1290 (D.C. Cir. 1988).
14. *Nowak v. St. Rita High School,* 142 F.3d 999 (7th Cir. 1998) (18 months to deal with after-effects of surgery was not reasonable); *Hudson v. MCI Telecommunications Corp.,* 87 F.3d 1167 (10th Cir. 1996) (employer not required to wait "indefinitely"); *Myers v. Hose,* 50 F.3d 278 (4th Cir. 1995) (employer not required to wait indefinitely).
15. *Rascon v. US West Communications, Inc.,* 143 F.3d 1324 (10th Cir. 1998).
16. EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (March 1999).
17. Cal. Gov't Code § 12926.1
18. *See* Cal. Lab. Code § 132a.
19. *Judson Steel Corp. v. WCAB,* 22 Cal. 3d 658 (1978).
20. A plaintiff establishes a prima facie case of retaliation by showing "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." *Yanowitz v. L'Oreal USA, Inc.,* 36 Cal.4th 1028, 32 Cal.Rptr.3d 436 (2005). The plaintiff may establish the causal link with evidence that the decision-maker knew about the protected activity and that the decision followed closely on the protected activity. *Morgan v. Regents of University of California*, 88 Cal.App.4th 52, 105 Cal.Rptr.2d 652 (2000).
21. Cal. Code Regs., tit. 2, § 7297.11.

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MCLE SELF-ASSESSMENT TEST

1. Both the Family and Medical Leave Act and the California Family Rights Act require all public employers to provide unpaid leave to allow bonding between parents and their newly arrived children, and to allow employees to have time to attend to their own serious health conditions or to those of their family members, without having to worry about job security.
❑ True ❑ False

2. Employees are eligible for up to 12 weeks of leave under the statutes if they have been on the payroll for 18 months, and have actually worked for 1250 hours in the preceding 18 months.
❑ True ❑ False

3. The employer must continue providing group health benefits during the leave period.
❑ True ❑ False

4. If the employee does not return from the family leave for at least 30 days, the employer may recover its health coverage costs, unless the failure to return is beyond the employee's control, or results from the continuation, recurrence or onset of a serious health condition.
❑ True ❑ False

5. If the leave is for any health condition, the employer may require medical certification that the condition meets the statutory definition.
❑ True ❑ False

6. All baby bonding leave with respect to a particular child must be taken within nine months of the child's arrival.
❑ True ❑ False

7. If the employer does not give adequate notice of the method used to calculate the 12-month period, the law presumes the method that is most beneficial to the employer.
❑ True ❑ False

8. A "key" employee is one who is salaried, among the highest paid 10 percent of employees within 75 miles, and denying a return to work is necessary to prevent substantial and grievous economic injury to the operations of the employer.
❑ True ❑ False

9. The CFRA *includes* pregnancy related conditions from its definition of serious health condition, while the FMLA *excludes* such conditions in its definition.
❑ True ❑ False

10. Both the FMLA and the CFRA restrict the family leave entitlement to children, spouses and parents.
❑ True ❑ False

11. Under the FMLA, if both *husband and wife* work for the same employer and are eligible for baby bonding leave, the employer may not limit them to a combined total of 12 weeks of leave for that purpose.
❑ True ❑ False

12. The Fair Employment and Housing Act provides a pregnant employee who is disabled by pregnancy with up to twelve months of leave.
❑ True ❑ False

13. Pregnancy leave may be taken on an intermittent or reduced schedule basis.
❑ True ❑ False

14. Although the pregnancy disability leave provision does not by itself require the employer to keep the employee's group health benefits in place, a woman who qualifies for the leave also has a serious health condition, as defined in the FMLA.
❑ True ❑ False

15. A woman is not entitled to pregnancy disability leave from her first day on the job.
❑ True ❑ False

16. Together, the CFRA and the pregnancy disability leave provisions entitle a pregnant woman to up to seven months of leave.
❑ True ❑ False

17. When responding to a leave request, public employers must also consider the requirements of the Americans with Disabilities Act and the disability discrimination provisions of the FEHA.
❑ True ❑ False

18. Most courts have concluded that regular attendance is not an essential function of the job, and that employers need to tolerate repeated, unplanned absenteeism.
❑ True ❑ False

19. The federal Equal Employment Opportunity Commission has opined that employers must extend leave and hold the disabled employee's position open indefinitely unless doing so would be an undue hardship.
❑ True ❑ False

20. The Workers' Compensation Act regulates employer leave policies through its prohibition on discrimination against workers who suffer an industrial injury.
❑ True ❑ False

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Lawyering in the Fish Bowl

*By Herman Sillas**

"Screw-up and you're fired." That's what Governor Jerry Brown told me when he named me Director of the California Department of Motor Vehicles in 1975. So commenced my career in the public sector. I have had the honor of serving as head of a large state department, as a United States Attorney, and as counsel to numerous public entities over the last thirty years.

As a private lawyer for fifteen years prior to Governor Brown's appointment, I knew government messed up. Catching bureaucracy mistakes is America's favorite pastime. For attorneys representing public entities, greater challenges are present. Not all of them have anything to do with law. I learned that at DMV.

TEST THE WATERS

With Jerry Brown's words still ringing in my ears and wanting to keep my job, I decided to find out who was suing DMV. Reduction of litigation is always a good goal. On the list was a Mr. Gay from the bay area. He wanted a "Mr. Gay" personalized license plate. DMV refused to issue it. He sued.

"Is that his real name?" I asked.

"Yeah. That's his name," I was told. The unit in charge of issuing personalized license plates had denied his request because it believed the word "gay" would be offensive to the general public. So here was DMV, in 1975, being sued by a guy who wanted a license plate that matched his name.

"Give it to him," I said. And just like that DMV's position changed.

That incident remains a constant reminder to me on how government can alter the course of people's lives. Someone in the bureaucracy had made a decision that he or she thought was correct based on some subjective criteria. The decision affected Mr. Gay. His options were to accept DMV's response or sue. Was my decision a change in policy? No. I just didn't think "Mr. Gay" was viewed as offensive by the general public. Was I correct? Who knows? I never got a letter from the public complaining about seeing "Mr. Gay" on a license plate. If I had or, more important, if the Governor had received a complaint, he might have concluded that I "screwed up" and it could have been good-bye job.

KNOW YOUR SURROUNDINGS

On another occasion, I was meeting with a delegation of car dealers. They asked me how DMV determined which dealer to audit? I didn't know and asked the Chief of Compliance. He said there were written guidelines that DMV used. I promised the dealers that I would provide a copy of the guidelines the next time we met.

Following the meeting, I asked the Compliance Chief for a copy of the guidelines. He said Compliance didn't have it. The list of the dealers to be audited came from the Registration Division. I summoned the Registration Chief to my office and asked for a copy of the guidelines. He in turn called the supervisor of the unit that generated the list to report to my office. The supervisor arrived but didn't have the guidelines. He assured me that Betty (not the employee's true name) had them because she generated the list. I asked if the guidelines were written. "Absolutely," I was assured.

With my Chief Deputy, the Compliance Chief, the Registration Chief, and a unit supervisor sitting in my office, I requested that Betty join us. Shortly thereafter, in walked a frightened fifty-plus aged woman. It was clear that she had never been to the Director's office in the thirty years she had worked for DMV. I tried to calm her and told her I just needed some information about the guidelines we used to pick dealers that we audited. I asked if she had some written criteria. She looked at the men assembled and said, "no." I asked if she had ever seen any guidelines? Same answer.

"How do you decide which dealer to list?" I asked.

"Oh, I consider a lot things."

"Like what?"

"Well, if they send in bad checks or pay the wrong fees."

"One time?"

"No, not just one time."

"How many times?" I asked.

"Oh, maybe three or four times, or more" she said looking at her supervisor.

"Over what period of time?"

"I dunno, maybe a week or month, something like that, but it's not just checks. It's the forms too."

"What do you mean?"

"Well, like if they misspell words or leave blank spaces."

"One time?"

"No."

"How many times and over what period of time?"

"It's hard to say. Maybe ten times, something like that, unless it's really bad."

"What do you mean?"

"If it's really messy."

"Messy?"

"Yeah."

"So if a dealer sends in the wrong fees, over a period of time that is uncertain, or sends in messy forms, then he or she is going to get audited?"

"No," she said. "You just get a gut feeling about a dealer."

"And when you get that gut feeling, then the dealer gets on your list."

"Yes."

I thanked and excused her. I then turned to the rest assembled and said, "so much for the written guidelines that you all been telling me about." They knew their next assignment.

The lesson: don't take anything for granted. If a client says they have something in writing, I want to see it. If it doesn't match what I've been told, I want to straighten it out. This avoids embarrassing moments later on.

I don't believe that the persons that told me DMV had written guidelines were lying. They believed that such a document existed. Unfortunately, they were merely repeating what they had been told without verification. Do that as a lawyer and I've messed up.

CHOOSE WHERE TO SWIM

When I was appointed as the United States Attorney for the Eastern District of California, I went from a state government decisionmaker to federal prosecutor and chief litigator for the United States. If you represent the federal government, you are in court a lot. Environmentalists, contractors, Native Americans, civil rights organizations and disgruntled taxpayers don't hesitate to sue the federal government. Sometimes they have a case and sometimes they do not.

I inherited a civil action brought by more than 300 plaintiffs against the Navy and the Southern Pacific Railroad for transporting Navy bombs that went off as the train rolled into the Roseville Railroad Station. Fortunately, no one was killed, but the blast destroyed property and injured hundreds. The federal government and the railroad had filed cross-complaints against each other alleging negligence. Everyone connected with the making of bombs or manufacturing of railroad cars was joined in the lawsuit. The plaintiffs had formed a committee to share information, develop strategies and gang up on the two deep pockets, Southern Pacific and the United States.

Eventually, all defendants in the case contributed to a fund which the plaintiffs' committee doled out to claimants based on a formula the parties had agreed upon. All defendants were dismissed and the railroad and the United States remained to pursue their cross-complaints against each to recover monetary damages. After six months of trial, the presiding judge had heard enough about brakes and bombs. He called me on the phone and growled, "Sillas, get this case out of my court."

We didn't have to settle. One advantage of working for the federal government was that money for investigations and litigation was never an issue, neither in civil nor criminal cases. If you needed information, the FBI, Secret Service, Postal Inspectors or Internal Revenue agents were at your disposal. Either Washington, D.C. or another US Attorney's office had research or pleadings available to share. We were ready to go on with the trial. But, sometimes it's too "costly" to find out who's at fault. I got authority to settle from Washington, D.C., and made one judge very happy.

Setting priorities was also a major function on the criminal side. Criminal cases were always being presented for prosecution. They ranged from bank robbery, selling narcotics, smuggling, stealing welfare checks, or cutting down a Christmas tree in a federal forest.

I inherited an investigation of the state legislature over allegations of corruption. I convened a grand jury to assist in the probe. One of my major concerns was to not reveal to the media whom we were investigating. Naming the legislators could have brought irreparable damage to their reputations. An investigation did not mean guilt or wrongdoing. Having been in public life, I was sensitive to that issue. Investigations of alleged white collar crimes do not always bring forth indictments. An investigation, however, does attract the media. I wanted to protect the integrity of the investigation and not cause irreparable damage to innocent legislators' reputations.

The grand jury issued one indictment (not against a legislator) which resulted in a hung jury. I dismissed the action and later closed down the grand jury. Sometimes the old saying, "where there's smoke there's fire," isn't always true. The smoke can be nothing more than flying dust caused by an ill wind or someone with an agenda. A public lawyer needs to know the difference, and needs to know how to keep the innocent from getting burned.

SEE THE WHOLE PICTURE

Upon my return to the private sector, I wanted to continue representing public entities. I enjoyed being involved with decisions that impact policy or the course of history in some instances. Decisionmaking by public entities is unique. The more visible decisions are influenced by the political climate of the day. The less visible are made in the bowels of the bureaucracy by individuals who believe they are doing the right thing or know they aren't but figure no one cares.

The role of outside counsel can be very limited or very broad, depending on the client and the circumstances. Sometimes I was retained to perform a specific function such as conduct an investigation, defend the entity in a lawsuit because of my specific expertise, or provide an answer to a question that has been posed. In any of these situations, I had to remember that the client is a public entity. Its acts will always be subject to scrutiny. I keep three questions in mind when rendering services for public entities.

The first question is, *can the public entity legally do it?* Counsel must determine whether there are constitutional issues, case law, or legislation that prohibits the entity from taking the action it proposes. For example, can DMV require residents to provide a DNA sample before issuing a driver license or identification card? Such action will surely bring opposition from civil rights groups and others. The proposed policy must withstand a legal attack. Yet, the political climate may be significant enough that the administration shops for counsel that will give it an opinion that it wants. My reputation rides with every opinion I write. Political climate changes like the weather. Those changes bring new perspectives. Will my opinion withstand the scrutiny of time and a change in administration? More important, will I sleep at night?

Assuming I determined that the agency can legally do something, the next question becomes, *should the public entity do it?* Although this is a policy issue, I submit that I should explore it and consider what might happen if the policy is implemented. Where will the opposition come from and who will support the action? Exploring the answer in this arena gives evidence to the client that I have more to contribute than a legal opinion. Hopefully, I've enhanced my value. Some clients may react negatively to my comments, viewing that I invaded their realm of expertise. I respect that, but failure to initially act reduces me to a research paralegal. I submit clients want more than that from their lawyers.

Once the decision to go forward is made, there is one final question, *how should the policy be implemented?* Although this can be perceived as an arena for administrators to figure out, I believe I can also contribute to the answer. For example, if the DNA sampling procedure is not reviewed by counsel, DMV may find itself defending lawsuits for assault and battery or false imprisonment caused by overzealous employees carrying out the new law. A well-intended policy can become a political and public relations disaster. Part of my role is to make sure that doesn't happen.

A public entity is a unique client. Everyone owns it. Perfection is demanded but not expected. Mistakes are suspected whether they occur or not. Cover-ups are believed whether real or not. In this climate, we function as lawyers attempting to guide the right course. It is a great challenge. If you're right, it is the most rewarding feeling you can have in the practice of law. If you screw up, though, you're fired . . . and everyone reads about it.

* Herman Sillas, principal of The Sillas Law Firm located in downtown Los Angeles, continues representing public entities and serving as general counsel for non profit organizations.

Applications are now being accepted to serve on the Executive Committee of the Public Law Section

The Public Law Section is looking for a few good lawyers to serve on its governing board, the Executive Committee. Interested applicants should have experience in the area of public law, and a proven track record of commitment to volunteer service. The Committee includes representatives from the public sector and private sector in all levels of government practice.

The Executive Committee is responsible for:

- Designing and implementing various educations programs
- Publishing the quarterly Public Law Journal
- Taking positions on proposed legislation in the area of public law
- Obtaining grant moneys to fund special projects
- Continually seeking to implement new and innovative programs

If you have the necessary skills and experience, and a genuine interest in promoting the goals and objectives of the Public Law Section, we invite you to apply to serve on the Executive Committee. If you have any questions, call Thomas Pye at (415) 538-2042. Send your resume and a cover letter to:

Public Law Section Administrator
State Bar of California
180 Howard Street
San Francisco, CA 94105

A Kinder, Gentler Way: Alternatives for Resolving Open Government Law Conflicts

*By Barbara S. Blinderman**

Let's not start the discussion about how to resolve open government conflicts in a context of ethics. Ethics, like patriotism (as one 18th century skeptic said of the latter), is the last refuge of scoundrels. Well, you might argue that a protective ethical blanket may be one rung above the patriot's mantle. But, I've really never met a lawyer who doesn't think he or she is ethical, no matter where they stand on the political continuum, when deciding whether they are doing the right thing in providing or withholding information about the government's business from the public. It's really a question of perspective. How you see your job. For a government lawyer, there are two ways of looking at it:

1. YOU ARE THERE TO ADVISE.

"The attorney is never the mere hireling of government or of anyone else. He is an independent professional and must stand on what he thinks is right." (Weinstein, *Some Ethical and Political Problems of a Government Attorney* (1966) 18 Maine L.Rev. 155, 162, as cited in the State Bar's Request for Comment on its Proposed Amendment to Rule 3-600 of the Rules of Professional Conduct of the State Bar of California). That's the public officer impressed with a public trust view. He does justice and refrains from misleading his adversary. (*Chapman v. Rapsey* (1940) 16 C.2d 636, *People ex rel. Clancy v. Superior Court* (1985) 39 Cal. 3d 740, *City of Los Angeles v. Decker* (1977) 18 Cal. 3d 860). This perspective is more likely to be held by long-term, secure, in-house counsel with tenure.

2. YOU ARE THERE TO PLEASE.

"In some cities I am asked to be very scrupulous about advising on the Brown Act; and in other cities, I'm more often, and much more often, asked to devise ways to get into executive session that are very clever, if I possibly can ..." James L. Markman, Richards, Watson and Gershon, speaking to the League of California Cities' Mayors and Council Members Executive Forum in 1998. That's the pragmatist, I-like-my-job view. Or, to be kinder and gentler, the "I'm a lawyer and the city is my client and I'm here to get them what they want" view. Can't argue with that reality. That's adhering to the ethical obligation.

When you go to court, these contrasting views regarding enforcement of open government laws are reflected there, too. On the one hand, it has been held that: "Public disclosure is a critical weapon in the fight against government corruption. Whether there is real impropriety or merely the appearance of an impropriety, the public has a right to know the particulars." *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal. App. 4th 511, 515.

On the other hand, the Supreme Court believes that the public may sometimes be better served by pragmatism. In interpreting the deliberative process privilege into the body of California law, the Court determined that the privilege: "... is grounded in the unromantic reality of politics; ... Politics is an ecumenical affair; it embraces persons and groups of every conceivable interest: public and private; popular and unpopular; Republican and Democratic and every partisan stripe in between; left, right and center. To disclose *every* private meeting or association of the Governor and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience. *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1346

Now, with the passage of Proposition 59, it's not just Legislative Intent that says you've got to let the public in (Gov't Code §54950, Gov't Code §6250, Gov't Code §9070, Gov't Code §11120). The California Constitution provides:

> "The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." California Constitution, Art. I, sec. 3 (b) (1)

Not only is the public's right to know what government is doing a constitutional prerogative of the citizenry, as a result of the enactment of Prop. 59 (passed by 81 per cent of the electorate), the deliberative process exemption may no longer exist. It will take some enforcement to find out what the courts' views are.

Enforcement? Mano a mano in the court system? That's the way it's done in California. Is that a realistic palliative? It may serve a function (produce a winner) in a discrete situation, but a court loss isn't enough to convince government people that they can do their jobs better by interpreting access statutes liberally. In this respect, a Joint State Legislature task force, totally frustrated in its efforts to get records, first from Governor Pete Wilson and later from Chuck Quackenbush's Department of Insurance, concluded:

> "Due to the fact that there are virtually no sanctions when a government entity refuses to comply with the CPRA, compliance is currently at the whim of agency officials. Government officials who do not want to release public documents simply don't."
>
> "... the CPRA, as currently written, is of little value to the public and will remain so until it is revised to provide simple and effective recourse in cases of noncompliance." KEEP OUT: The Failure of the California

Public Records Act, Report by The Joint Legislative Staff Force on Government Oversight, July 1998.

The same could be said for the Brown Act, Bagley-Keene and the Legislative Open Record Act.

In addition, relying on lawsuits is a very expensive way to do business. Nobody has ever done a comprehensive study of how much enforcing open government laws through the courts costs the taxpayers. The government is very likely to pay attorneys fees when it loses, and pays more when it decides to fight payment of attorney fees and loses that ancillary issue. Even when a public agency wins, especially with the ever increasing recourse to privatizing litigation, it pays whether it wins or loses, because it has to pay its own attorneys no matter what.

Other states have tried other ways; so have some California cities, with their Sunshine Laws (at last count, there appear to be about seven: San Francisco, Oakland, Contra Costa, Richmond, City of Riverside, Milpitas and Benicia). The possibilities to avoid the adversary process in court include:

1. Sunset Laws - Florida. The Open Government Sunset Reviews Act provides that exceptions to disclosure are subject to review and automatically repealed unless reenacted by the Legislature every 5 years. While this may not appear at first glance to be an enforcement mechanism, it does serve the purpose of forcing the Florida legislature to review exceptions with the potential that what is not needed will be eliminated. It keeps the focus on opening government rather than looking for reasons to keep information secret.

2. Commissions. In Connecticut, a state commission issues opinions, based on complaints. It serves as a way of avoiding unnecessary litigation on issues that can be easily analyzed. Similarly, San Francisco has an active and forceful task force with recourse to administrative provisions, an attorney with primary responsibility to the task force, and a budget.

3. Recourse to the Attorney-General. In Kentucky, when an agency denies access to public records, the requester may ask the Attorney General's Office for an opinion. Unless contested in court, the Attorney General's response has the force of law. According to the California Joint Legislative Staff Force on Open Government, and the University of Florida Citizen Access Project (citizenaccess.org), it works ("In practice, Attorney General decisions usually stand as issued and agencies comply rather than go to court," Joint Legislative Task Force, p. 15). Similar legislation has been introduced twice in California and passed by both houses of the Legislature, the second time unanimously, but was vetoed by Governor Davis both times. (Senate Bill 48 in 2000; Senate Bill 2027 the following session). It remains a viable approach to avoid the costs of litigation where the law is settled or where the obstacle is agency intransigence.

Ultimately, it's the 4th proposal that works ... it's a question of attitude. According to a 2002 survey of state access laws by the Better Government Association (bettergov.org) in cooperation with Investigative Reporters and Editors, Inc. (ire.org), California ranks 21st among the 50 states, with a grade of C- in its open government performance. That's no way to run a state. There are other kinder, gentler ways to get the job done.

* Barbara S. Blinderman is a member of the firm of Moskowitz Brestoff Winston & Blinderman LLP. She has over twenty-five years of experience in public policy law, from the public's side.

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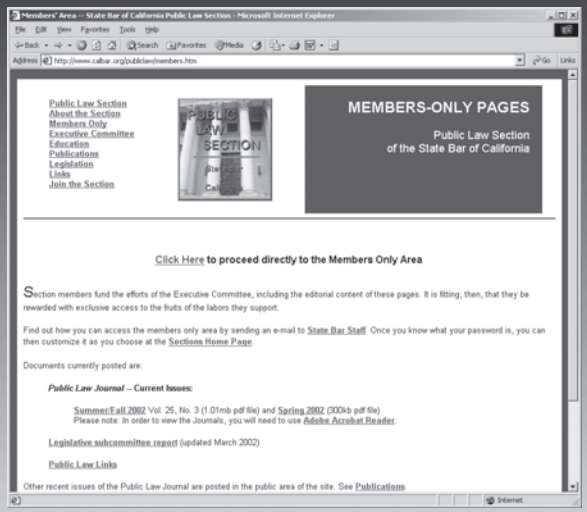

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2006 PUBLIC LAWYER OF THE YEAR

Do you know a public law practitioner who deserves special recognition because of outstanding service to the public?

If so, that person could be the recipient of the Public Law Section's "Public Lawyer of the Year" award.

Each year the Public Law Section honors a public lawyer selected by the Public Law Section Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Section Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in Public Law.
2. An exemplary record and reputation in the legal community.
3. The highest ethical standards.

Not necessarily a political figure or headliner, the ideal recipient would be a Public Law practitioner who has excelled in his or her public service without fanfare. The Public Law Section Executive Committee supports the goal of diversity in the membership and leadership of the State Bar. Accordingly, the Executive Committee will ensure that the achievements of all outstanding members of the Bar who practice public law are carefully considered.

Nominations are now being accepted. The 2006 Public Lawyer of the Year award will be presented at the State Bar Annual Meeting in Monterey on October 6, 2006.

Send nominations, no later than 12:00 midnight, April 1, 2006, to:
Thomas Pye, Public Law Section, State Bar of California, 180 Howard Street, San Francisco, CA 94102-4498

To nominate an individual for this award, fill out the official nomination form below.
Add attachments, if necessary.

Nominee's Name: _____

Years of Public Law Practice: _____ **Place of Business:** _____

Brief statement why Nominee deserves recognition: _____

_____

_____

Nominator's Name: _____ **Telephone Number:** _____

Address: _____

2006 Public Lawyer of the Year Sponsorship Opportunities

The Executive Committee of the Public Law Section would like to invite you to become a sponsor of the 2006 Public Lawyer of the Year (PLOY) Award.

The PLOY Award is given annually to a public law practitioner deserving of special recognition because of outstanding public service. The recipient is nominated by his/her peers and the award is usually presented by the Chief Justice of the California Supreme Court at a special reception during the State Bar Annual Meeting. The PLOY Award reception this year will be held October 6, 2006 in Monterey.

Sponsorship carries with it the opportunity to indicate to the legal and judicial community the support of yourself, your firm or your agency in this public service award. Your contribution will defer the cost of nominating and granting the award and will be added to a permanent endowment. The purpose of the endowment is to accumulate monies that will permit investment income to sustain the award.

Sponsors will be recognized as a special guest at the Public Lawyer of the Year reception. Your name and level of sponsorship will appear at the reception, on the State Bar's Annual Meeting list of programs, and in the Public Law Journal. It will also be posted on the Section's website.

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For more information on the reception or on being a sponsor, please contact Tom Pye by telephone at 415-538-2042, or email him at thomas.pye@calbar.ca.gov.

A Message from the Chair

By Terence R. Boga

A little over seven years ago, my predecessors on the Executive Committee adopted an ambitious mission statement for the Public Law Section. Among other tasks, the mission statement charges the Public Law Section with "provid[ing] resources for public law practitioners through publications, continuing education and other projects." Everyone reading this column is of course familiar with our primary and most wide-reaching resource—the *Public Law Journal*. Hopefully, many of you have also attended some of the MCLE courses sponsored by the Section each year at the State Bar's Section Education Institute and Annual Meeting. There is another important resource provided by the Section that, to date at least, has been underutilized by public law practitioners. That resource (one of our "other projects") is the discussion board on the State Bar website. Accessible after the "My State Bar Profile" page has been logged into, the discussion board is a remarkable opportunity for public law practitioners to raise issues and brainstorm solutions on matters of import to public agencies generally. I encourage you to give the discussion board a try. You may be surprised by the camaraderie you experience.

Join The Public Law Section

Use this application form. If you are already a member, give it to a partner, associate, or friend.
Membership will help you SERVE YOUR CLIENTS and SERVE YOURSELF now and in the future.

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